No. 01-1120

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In the
Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors®,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE National Association of REALTORS® IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the National Association of REALTORS® (hereinafter NAR), submits this brief in support of the petitioner, DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors®.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

NAR is a non-profit professional association that is incorporated in Illinois and represents persons engaged nationwide in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. As such, NAR is a champion of the interests of real estate professionals and real property owners throughout the United States.

Founded in 1908, NAR is headquartered in Chicago, Illinois. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. In pursuit of these objectives, NAR is concerned with a wide range of activities, including promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, public service, and cultural

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[1] The parties have consented to the filing of this brief. The letters of consent are filed with the Clerk of the U.S. Supreme Court herewith. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

diversity. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 State Associations of REALTORS®, approximately 1,600 Member Associations of REALTORS®, and approximately 795,000 "REALTOR®"[2] and REALTOR-ASSOCIATE® members. Petitioner David Meyer has retired from active real estate practice, but before doing so, including at the time of the events at issue in this case, was a member of NAR.

INTRODUCTION

NAR has a substantial and long-standing commitment to equal opportunity in housing and fair housing compliance. Pursuant to this commitment and immediately upon the adoption of the Fair Housing Act, 42 U.S.C. §§ 3601-3619, NAR adopted Article 10 of its Code of Ethics which mandated that:

> The REALTOR® shall not deny equal professional services to any person for reasons of race, creed, sex or country of national origin. The REALTOR® shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex or country of national origin.[3]

In 1972, NAR supplemented this Article with the Code of Equal Opportunity, to which each member is also obligated to adhere. Then in 1975, NAR and the United States Department of Housing and Urban Development ("HUD")

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[2] "REALTOR®" is a federally registered collective membership mark used by members of the NATIONAL ASSOCIATION OF REALTORS® to indicate their membership status.

[3] Article 10 was amended to add the protected classes of handicap and familial status upon the enactment of the Fair Housing Amendments Act of 1988.

created and adopted a Voluntary Affirmative Marketing Agreement ("VAMA"). This VAMA was the first nationwide program to implement Section 809 of the Fair Housing Act which calls for the Secretary of HUD to "work out programs of voluntary compliance and of enforcement" with persons in the housing industry. 42 U.S.C. § 3609. The HUD/NAR VAMA served as the model for affirmative marketing agreements subsequently adopted by other segments of the real estate market, including the National Association of Homebuilders, the National Association of Real Estate License Law Officials and the American Institute of Real Estate Appraisers.[4]

The VAMA was renewed by HUD and NAR in 1981, 1987, and again in 1992. It was replaced in 1996 with the NAR/HUD Fair Housing Partnership Agreement, which remains in effect today. The Partnership Agreement lays out a comprehensive program for NAR and HUD, as partners, to implement their commitment to fair housing.

In addition to the commitments made with HUD to further fair housing, NAR also established its Office of Equal Opportunity, requires attendance at approved fair housing training as a condition of membership in the Association and urges each of its state and local associations to establish an Equal Opportunity Committee. NAR has also developed comprehensive educational programs on fair housing and cultural diversity for its membership.

NAR's interest in and concern about the opinion of the Ninth Circuit derives directly from this commitment to Fair Housing Act compliance. Fundamental to the success of NAR's continuous efforts to educate its members and encourage them to employ real estate brokerage practices that

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[4] The American Institute of Real Estate Appraisers merged in 1990 with the Society of Real Estate Appraisers to become the Appraisal Institute.

comply with the Act is that the Act's obligations be understood and applied by enforcement authorities, HUD and by the courts in a fair and reasonable fashion. Regrettably, such consistency and fairness are wholly absent from the result reached by the Ninth Circuit with respect to the Petitioner. Moreover, the unprecedented and sweeping breadth of the opinion below is of far reaching importance and concern to NAR's many members, as well as the hundreds of thousands of others involved in real estate. Unless the analysis and conclusion of the Ninth Circuit are corrected by this Court, other federal courts will struggle to resolve the conflict between existing case precedent and the unduly broad and misguided language of this opinion regarding the personal liability of owners and officers of real estate brokerage corporations for discriminatory conduct by the sales agents of such corporations. Inevitably, the result will be inconsistent results from court to court, and quite possibly a new era of liability under the Act never before conceived of and undoubtedly unintended by Congress.

SUMMARY OF ARGUMENT

The decision below merits this Court's attention because of the confusion it introduces into the law regarding the application of the Fair Housing Act to owners and officers of real estate brokerage corporations. The Ninth Circuit concluded that an individual is personally liable solely in his capacity as owner or officer of a real estate corporation when an agent of that corporation has engaged in conduct unlawful under the Act. To reach that unprecedented result, the court disregarded established principles of agency and corporate law,[5] and failed to apply the fact-

[5] Shareholder insulation from liability has been the cornerstone of corporate law in the United States since the nineteenth cen-
(continued...)

intensive analysis employed in the very decisions it relies upon. The Ninth Circuit also wholly ignored, indeed failed to even cite and distinguish, prior cases holding precisely to the contrary of its holding—that is, that corporate officers and owners of real estate firms are not, as a mere consequence of holding such positions, liable for the discriminatory practices of sales agents of the corporation. Thus, to the extent that it might be possible to reconcile those prior decisions with this opinion and those on which it relies based on the particular facts of each, the Ninth Circuit's lack of factual analysis makes such a reconciliation impossible, and a conflict between the cited decisions inescapable.

The inevitable result of the Ninth Circuit's ruling, absent this Court's correction of that result, will be inconsistent and chaotic application of the Fair Housing Act to corporate owners and officers of real estate firms. This Court should grant *certiorari* to direct the Ninth Circuit to apply appropriate standards so that this important measure of protection for equal opportunity in housing is applied consistently and fairly.

(...continued)
tury. Virtually every state has a statute that limits shareholder liability to the value of the shares held and case law that protects such shareholders from liability for the actions of the corporation. Shareholders will not, however, be insulated from liability for the tortious acts of the corporation if one of two circumstances is present. First, shareholders may be held liable if they participate in or aid in the commission of the tortious act, which is not alleged in the instant case. Second, shareholder liability can be created or imposed by statute, which the Fair Housing Act does not do.

ARGUMENT

THIS COURT SHOULD GRANT *CERTIORARI* IN ORDER TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO THE PERSONAL LIABILITY OF AN OWNER OR OFFICER OF A BROKERAGE CORPORATION FOR THE FAIR HOUSING VIOLATIONS OF THAT CORPORATION'S SALES AGENT.

NAR urges this Court to accept this case to address two specific bases relied on by the Ninth Circuit[6] to hold Petitioner Meyer personally liable for the discriminatory acts of Triad sales agent Grove Crank. First, the court held Meyer personally liable for the agent's conduct based solely on his status as owner[7] of Triad, a real estate brokerage corporation:[8]

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[6] The Ninth Circuit also asserts that its holding is supported, in part, by a HUD regulation that addresses the parties against whom an administrative complaint, rather than private litigation, may be filed, and that provides that such a complaint may be brought under the Fair Housing Act against "a person who directs or controls, or has the right to direct or control, the conduct of another person. . . ." 24 C.F.R. § 103.20 (1999). Notwithstanding the court's reference to that HUD regulation, the court's discussion and conclusions regarding Meyer's liability as owner and officer focus almost exclusively on case law which conflicts with or ignores prior case law, as discussed herein. For that reason, and because the regulation has in any event been amended to completely eliminate the language to which the court refers, see 24 C.F.R. § 103.20 (2000), one cannot conclude that the court's reference to that HUD regulation provides an independent basis for the court's decision and avoids the conflict among federal court decisions.

[7] The Ninth Circuit did not decide the issue of whether Meyer is the sole owner of Triad, and remanded to the district court to make that determination.

[8] Ownership of a majority or even all of the stock of a corporation by one person does not in itself impose any additional or different

(continued...)

> *Our rule under Phiffer renders the sole owner of a corporation liable based on the non-delegable duty to obey the FHA . . . .*

Holley v. Crank, 258 F.3d 1127, 1132 (9th Cir. 2001).[9]

Second, the Ninth Circuit also held Meyer personally liable for agent Crank's conduct based solely on Meyer's status as President of Triad:

> *[W]e join other courts in holding that officers can be individually liable for discriminatory acts of corporate employees under their management and control.*

Holley, 258 F.3d at 1134.

(...continued)
liability on the shareholder than the law imposes on stockholders generally when the stock is owned by a number of persons. *Texas Industries v. Dupuy & Dupuy Developers, Inc.*, 227 So. 2d 265 (La. App. 1969).

[9] The court also concluded that "[I]f Meyer solely owned the agency, he had at least the authority to control the acts of his salespersons, particularly in light of his position as president and officer/broker of Triad. As discussed above, this is enough, under the approach we adopt here and that adopted by a number of courts, to hold Meyer personally liable." *Holley*, 258 F.3d at 1133. That language is ambiguous as to whether the court is holding Meyer liable simply by virtue of his capacity as owner, or whether the court's conclusion is that his liability arises only if his corporate ownership is *also* coupled with the "authority to control (his) salespersons" and his "position as president and officer/broker." Since the court offers no factual support for its contention that Meyer actually had the authority to control his salespersons, and devotes separate sections of its opinion to Meyer's personal liability as sole owner, as president, and as designated officer/broker of the corporation, it appears clear that the Ninth Circuit means just what the above quoted text says: Meyer is personally liable based on his status as sole owner of the corporation, without more.

These two conclusions of the Ninth Circuit require review by this Court because they directly conflict with prior rulings by other federal courts regarding the liability, under the Fair Housing Act, of corporate owners and officers of real estate brokerage corporations. Careful analysis of the cases cited by the Ninth Circuit further reveals that there is no foundation whatsoever for its far-reaching conclusions. Moreover, to the extent that the cases cited by the court below could somehow be said to provide an adequate basis for the court's conclusions, the need for this Court's involvement is underscored, because that would mean that the conflict among Federal courts regarding this important issue—the personal liability of corporate owners and officers for the Fair Housing Act violations of sales agents of the firm—is even more pervasive. Put differently, a conclusion that the Ninth Circuit's decision here is, in fact, the correct result in light of the cases on which it relies would mean that all those decisions, and not simply the opinion below, are in conflict with the decisions that hold that corporate owners and officers are not, without more, liable for Fair Housing Act violations of sales agents of their corporations. In either case, however, it is quite clear that this Court's review of the decision below is necessary to reconcile these conflicting decisions and to remove the significant lack of clarity and substantial uncertainty regarding this issue, which is of great consequence to hundreds of thousands of real estate brokerage corporation owners and officers.

A. The Ninth Circuit's Decision Conflicts With Prior Well-Reasoned Decisions Regarding the Liability of Corporate Owners and Officers of Real Estate Firms Under the Fair Housing Act.

The Ninth Circuit's conclusion that Meyer, as owner and officer of Triad and without more, is personally liable for the fair housing violations of sales agent Grove Crank,

conflicts with prior decisions of courts that have started with the basic tenet of corporation law that "no individual may be held vicariously liable for a company pattern or practice simply because she is an officer or manager of the company." *U.S. v. Lorantffy Care Center*, 999 F.Supp. 1045 (N.D. Ohio 1998). Recognizing that the compelling need to enforce the Fair Housing Act must be reconciled with the respect courts and legislatures must afford innocent corporate owners and officers, a number of courts have rejected holding corporate owners and officers liable under the Fair Housing Act by virtue of their status alone. *Reed v. Michael Realty & Associates, Inc.*, 1994 WL 559225 9, 10 (N.D. Ill. October 7, 1994); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F. Supp. 1232 (N.D. Ohio 1983), *aff'd in part, rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985), *cert. denied by Hilltop Realty, Inc. v. City of Cleveland Heights*, 475 U.S. 1019 (1986), *accord, Lorantffy*, 999 F.Supp. at 1045; *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141 (4th Cir. 1975). These courts have opted instead for a careful and thorough analysis of the facts regarding the relationship of the corporate owners or officers to the allegedly discriminatory conduct or to their involvement in the actual management of the corporation.

For example, in *Heights Community Congress v. Hilltop Realty, Inc*, the U.S. District Court, District of Northern Ohio, declined to hold Vincent Aveni, the president, chief operating officer and co-owner of Hilltop Realty, Inc., vicariously liable for the fair housing violations of Hilltop agents, absent a showing "that he participated in their acts or knew of and ratified their acts and statements." 629 F. Supp. at 1304. Here, the court reasoned, the agents had a contractual relationship with the corporation, not with Aveni, so it was the corporation that was liable for the imputed actions of the agents. *Id.* at 1303. The court further declared that Aveni's "partial stock ownership would

not permit a *per se* piercing of the corporate veil" and that Aveni's "status as president and chief operating officer in and of itself does not render him personally liable for acts of the corporation or its agents or employees." *Id.* at 1303-04. The court carefully examined other aspects of Aveni's conduct, and the fact that Hilltop and Aveni had not required sales agents to record the race of prospects. *Id.* The court concluded that while such recording is recommended to track and prove compliance, it is not required under the Fair Housing Act. *Id.* In short, the court refused to hold Aveni personally liable for the wrongful conduct of Hilltop's agents simply because he was an officer and co-owner of Hilltop. *Id.* The court further exonerated him after a thorough review of the facts showed that he had not participated in, knew of or ratified the discriminatory conduct. *Id.* at 1305. This result is precisely the opposite of the conclusion reached by the Ninth Circuit.

In *Reed v. Michael Realty & Associates, Inc.*, the U.S. District Court, District of Northern Illinois, found that the President and Secretary of the real estate brokerage corporation, George S. Michael, was not personally liable for the discriminatory acts of the corporation's apparent agent, Butch Daniels, by virtue of being a corporate officer and nothing more. 1994 WL 559225 at 10. Without expressly stating that Michael's status as Secretary and President was insufficient to hold him liable for the acts of the corporation's agent, the court denied plaintiff's motion for summary judgment on that issue because plaintiff had failed to offer undisputed evidence that Michael actively supervised Daniels, knew that Daniels was involved in rental activities, or "that the agency relationship between Michael and Daniels was . . . close or direct." *Id.* at 9. In short, the court held that Michael could not be personally liable based strictly on the fact that he was an officer of the real estate brokerage corporation. *Id.* This result, too, is precisely the opposite of the conclusion the Ninth Circuit reached.

In *U.S. v. Lorantffy Care Center*, the court found that four individual defendants "associated with" a nursing home owned by a not-for-profit corporation (relationship not specified) were entitled to judgment as a matter of law. 999 F.Supp. at 1040-41. The law, the court said, provides that "no individual may be held vicariously liable for a company pattern or practice simply because she is an officer or manager of the company." *Id.* at 1044. The court focused its attention on Defendant Tibor Domotor, a minister who had founded the nursing home, with the aid of his church (a separate legal entity), for older Hungarian immigrants in need. *Id.* at 1040-41. The government alleged that the not-for-profit corporation that owned the facility had engaged in a pattern and practice of racial discrimination against African Americans, and that "Reverend Domotor and other LCC staff" had made discriminatory statements that resulted in this pattern and practice. *Id.* at 1041. The court held, however, that the individual defendants could not be held liable for the discriminatory pattern and practice, and that only the "company is liable for the acts and statements of its employees." *Id.* at 1045. The court noted that the other courts in its circuit that had addressed similar violations of the Fair Housing Act, with respect to the individuals who have ownership or management responsibilities for their corporation, have applied the "doctrine of vicarious liability to the company, not the company's individual officers." *Id., citing Hilltop*, 629 F.Supp. at 1303; *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974). Applying that reasoning to the context of the case before it, where a not-for-profit (nonstock) corporation owned the facility, the court declined to find the individual defendants personally liable simply because they were "associated with" the corporation. *Id.* at 1045. Again, this result conflicts with the conclusion of the Ninth Circuit.

Although it addresses the analogous issue of the liability of corporate directors for Fair Housing Act violations by corporate agents, *Tillman v. Wheaton-Haven Recreation*

Ass'n, Inc. is also instructive. 517 F.2d at 1141. In *Tillman*, the Fourth Circuit held that §§1981 and 1982 of the Civil Rights Acts of 1866 and 1964 "should be interpreted as neither enlarging nor diminishing the liability of directors under general corporation law for tortious acts performed nominally by the corporation." *Id.* at 1144. The Fourth Circuit was unwilling to find the directors of Wheaton-Haven Recreation Association personally liable for discrimination by the Association by virtue of their positions as directors alone. *Id.* Instead, the court engaged in a thorough examination of the directors' actions and intentions and reasoned that "directors become personally liable when they intentionally cause a corporation to infringe the rights secured by §§ 1981 and 1982." *Id.* at 1146. In short, the court was unwilling to hold corporate directors, who by definition are more directly responsible for corporate management than shareholders, personally liable for the discriminatory acts of the corporation or the corporation's agents by virtue of their positions alone.

Each of these cases conflicts with the result and simplistic analysis of the Ninth Circuit. Contained in each of these cases—but wholly absent from the Ninth Circuit's decision—is each court's careful scrutiny as to whether there was a sufficient level of involvement on the part of the defendant to warrant holding an individual personally liable for the fair housing violations of the agent of the corporation, organization or company. The benefits of these thorough analyses are threefold. First, the court satisfies the compelling need to provide relief for the victim of the discriminatory conduct, because in each case there is relief from the corporation. Second, the court does not cursorily punish an innocent owner or officer of the corporation personally based solely on his serving in these capacities. Third, the court embraces, rather than abandons, established and desired principles of agency and corporation law. This Court's involvement is essential to resolve the conflict

between the carefully drawn conclusions of the courts described above and the perfunctory analysis and incorrect conclusion of the Ninth Circuit in the instant case, and to prevent future conflicts and confusion by those many real estate corporation owners and officers regarding how to conform their conduct to the Fair Housing Act.

B. The Ninth Circuit's Decision Holding That an Owner or Officer of a Corporation Is Personally Liable for the Discriminatory Conduct of the Corporation's Sales Agent Is Not Supported By, and Exceeds the Principles Stated in, the Cases on which the Ninth Circuit Relies.

Despite the Ninth Circuit's citation of authority to reach the conclusion that Meyer, in his capacity as owner and officer of Triad and without more, is personally liable for the discriminatory conduct of sales agent Grove Crank, that decision is, in fact, unique and without precedent. The court cites and relies most prominently and emphatically on *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980), *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086 (7th Cir. 1992), *cert. denied by Ernst v. Leadership Council for Metropolitan Open Communities*, 508 U.S. 972 (1993), *Walker v. Crigler*, 976 F.2d 900 (4th Cir. 1992), and *Marr*, 503 F.2d at 735. Close examination of the holdings in those cases, and the facts out of which they arise, reveals the court's cursory, superficial and ultimately flawed analysis.

Phiffer involved the plaintiff's claim that he suffered unlawful discrimination in being denied the opportunity to rent office space by the "desk clerk" of the Proud Parrot.[10] 648 F.2d at 548. In addition to suing the Proud Parrot

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[10] In *Phiffer*, the plaintiffs' complaint was based on an alleged violation of 42 U.S.C. §1982, rather than the Fair Housing Act.

Motor Hotel, Inc., the plaintiff also sued Robert Chow, whom the opinion describes as "the owner of the Proud Parrot," *Id.* at 550. The opinion, however, is silent regarding the important distinction of whether Chow was owner of the motor hotel facility or owner of the corporate defendant Proud Parrot Motor Hotel, Inc. In holding Chow personally liable for the desk clerk's conduct, the Ninth Circuit, in *Phiffer*, noted that "[D]iscriminatory conduct on the part of a rental agent is . . . attributable to *the owner of a motel, apartment complex, or other public housing facility*" and that "[t]he duty of the owner *of such a facility* to obey the laws relating to racial discrimination is non-delegable." *Id.* at 552 (emphasis added). The court fails to indicate whether Chow's liability is based on his ownership of the motor hotel *facility* personally, or whether it derives from his sole ownership of Proud Parrot Motor Hotel, Inc., a failure that undermines the Ninth Circuit's reliance on *Phiffer* as support for its holding regarding Meyer's liability as corporate owner.

The Ninth Circuit's reliance on *Phiffer* is also compromised because of its failure to recognize another fact that appears to underlie the court's decision to hold Chow liable. While the Ninth Circuit in *Holley* claims that *Phiffer* "concluded that the owner of the Proud Parrot Motor Hotel Corporation was liable for the discriminatory conduct of his desk clerk *even absent any evidence that the clerk acted under management's instruction*," *Holley*, 258 F.3d at 1132, (emphasis added), the court dismissively relegates to a footnote the important contradictory fact that the *Phiffer* court specifically acknowledged, namely that "the magistrate found that the desk clerk's actions reflected the established policy of the Proud Parrot." 258 F.3d at 1132, n.3, *citing Phiffer*, 648 F.2d at 552.

For two reasons, then, *Phiffer* provides little or no support for the holding that Meyer is liable here. First, Chow may or may not have been an owner of the corporation, the

capacity in which Meyer is said to be liable here. Second, the court recognized that the desk clerk's actions were consistent with the policies of hotel management, presumably established by Chow, a fact not even alleged in *Holley*.

In *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, the Seventh Circuit held that the owner of the defendant corporation was personally liable for the Fair Housing Act violations of certain sales agents of the firm. 982 F.2d at 1086. In holding Matchmaker owner Erwin Ernst liable, the court noted that Ernst was sole owner, chief executive officer and that "[S]ignificantly, he supervises the day-to-day operations of Matchmaker and its agents." *Id.* at 1098. Based on those facts, and not simply on Ernst's status as owner of Matchmaker Real Estate Sales Center, Inc., the court held Ernst personally liable. *Id.* Thus, although the Ninth Circuit cites *Matchmaker* and claims to "adopt (its) reasoning," and "follow (its) lead," *id.* at 1133, in fact, the Ninth Circuit's conclusion conflicts with the decision in *Matchmaker*. The Ninth Circuit held Meyer liable, and will be read and understood by subsequent courts to have held him liable, merely on his status as owner and officer of Triad, while the Seventh Circuit in *Matchmaker* applied a more rigorous test that premised Erwin Ernst's liability on his status *also* as "chief executive officer and supervisor of day-to-day operations." *Id.*

The facts in *Walker v. Crigler* indicate why it is distinguishable and inapplicable here. 976 F.2d at 900. In *Walker*, the owner of rental property was held liable for discriminatory conduct by the property manager, whose duties included renting the property and who had been hired by the owner. *Id.* at 904-05. The court held that the property owner could not delegate to another his clear and primary duty under the Fair Housing Act not to discriminate in renting the property, and therefore it was irrelevant that the owner had not instructed the manager to engage in such conduct. *Id.* at 904. NAR acknowledges that the

"non-delegation" principle is properly applied in this context to hold a property owner, such as that in *Walker*, liable for the acts of the owners' agents. But the decision in *Walker* and the principle by which the owner in that case was held liable is wholly inapplicable to the quite different question of concern to NAR and presented in this case: whether an owner or officer of a real estate corporation is, by virtue of that status alone, obligated under the Fair Housing Act such that a violation of the Act by agents *of the corporation* can be imputed to him based on the non-delegability of those obligations. Traditional principles of *respondeat superior* and non-delegability operate to preclude a corporation from escaping liability for the actions of the corporation's agents, but whether such liability also extends beyond the corporation, to reach the corporation's shareholders and officers, is a distinct question that is not answered by these principles.

In *Marr v. Rife*, the Sixth Circuit reversed the District Court's conclusion that, as a matter of state law, the owner of a real estate firm could not be held liable for the discriminatory conduct of the firm's agents.[11] 503 F.2d at 735. In reversing that result and holding the proprietor of the real estate agency liable under the Fair Housing Act, the court relied extensively on facts demonstrating that there was actual supervisory control exercised by the proprietor over the agents of the real estate agency before concluding that "as owner of the agency, Rife had at least the power to control the acts of his salesmen." *Id.* at 742. It is also notable that the court in *Marr* reached its conclusion based on its extensive discussion of and reliance on *U.S. v. Northside Realty Associates, Inc.*, a case also cited by the court below in support of its conclusion regarding Meyer's liability as owner and officer of Triad. 474 F.2d 1164 (5th Cir. 1973). In *Northside*, the owner of Northside Realty Associates, Inc. was held liable for discrimination in housing by the corporation's agents. 605 F.2d at 1354. That conclusion by the Fifth Circuit, however, is clearly premised on the owner's significant personal involvement in discriminatory conduct, as well as his capacity as a broker for the firm, with substantial involvement in and direct oversight and supervision of the agents found to have violated the Act. *Id.* In short, neither *Marr* nor *Northside* support the Ninth Circuit's holding that merely as owner or officer of Triad, Meyer may be liable for the Fair Housing Act violations of Triad's sales agent Grove Crank.

[11] In the opinion, the firm is described only as "a real estate agency," and thus not necessarily a corporation. Indeed, the opinion refers to defendant Doug Rife as "proprietor of the agency," at least suggesting that the firm was a sole proprietorship, rather than a corporation. On that basis alone, the relevance of this case to the question of whether an owner or officer of a *corporation* is seriously compromised, if not entirely eviscerated, since the identity between a proprietorship and its proprietor make the agents of the firm agents of the individual proprietor as well.

The court also cites *U.S. v. Youritan Const. Co.*, 370 F. Supp. 643 (N.D. Cal. 1973), *aff'd in part, remanded in part by* 509 F.2d 623 (9th Cir. 1975). But that case holds nothing more than that the doctrines of *respondeat superior* and non-delegabilty apply to hold liable a principal, in this case the owner and the property manager of a residential rental apartment building, for the conduct of the principal's agents, in this case the apartment manager and rental agents. *Id.* As noted above, NAR acknowledges and does not dispute that conclusion. But it does not apply to, and provides no persuasive authority regarding, the question of the liability of the owners and officers of the principal when that principal is a corporation.

The only case cited by the court that is even arguably supportive of its holding is *U.S. v. Tropic Seas, Inc.*, 887 F.Supp. 1347 (D. Haw. 1995). Its relevance to the issues in the case below, however, is limited. In *Tropic Seas*, the

District Court denied the summary judgment motion of two directors of a corporation who were alleged to have committed violations of the Fair Housing Act, citing the nondelegability principle. *Id.* at 1365. In support of that ruling, however, the court referenced allegations suggesting that the defendant directors had affirmatively supported policies of the corporation that were central to the discriminatory conduct at issue. *Id.* at 1364-65. Moreover, the defendants were corporate directors, who are more directly involved in and responsible for corporate management than are shareholders. *Id.* For that reason, therefore, the Ninth Circuit's reliance on *Tropic Seas* as authority for the unprecedented and novel proposition that corporate owners, in that capacity alone, can be liable for the Fair Housing Act violations of corporate agents, or violations attributable to the corporation by virtue of the acts of its agents, is unwarranted.

In sum, the authority relied on by the Ninth Circuit neither supports its conclusions that an owner or officer of a real estate brokerage corporation, in those capacities alone, can be held personally liable for the Fair Housing Act violations of corporate agents, nor is it a reasonable and natural extension of those decisions. The Ninth Circuit confuses or misapplies the well-accepted doctrines, embraced by these cases, that a corporation may be liable under *respondeat superior* and the nondelegability of the duty to comply with the Fair Housing Act, with the far different issue of the liability of the corporation's owner(s) and officers. This important question of federal fair housing law affects literally hundreds of thousands of individual real estate brokerage corporation owners and officers. This Court's review is necessary to resolve the conflict between the Ninth Circuit decision in *Holley* and the cases on which it relies, and the decisions in Section A, *supra*, that hold quite directly and clearly that corporate owners and officers are *not* personally liable, absent additional facts related to

their participation in the real estate activities of the firm or the discriminatory conduct of the firm's agents.

CONCLUSION

For the foregoing reasons, NAR respectfully urges this Court to grant the Petition for certiorari.

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Respectfully submitted,

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